Supreme Court, U.S.
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No. 77-1728

# In the Supreme Court of the United States

OCTOBER TERM, 1978

MILTON SHIFFMAN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is not yet reported.

## JURISDICTION

The judgment of the court of appeals was entered on May 4, 1978. The petition for a writ of certiorari was filed on June 2, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the privilege against compulsory self-incrimination excuses petitioner, a tenant in common of real estate, from compliance with a grand jury subpoena to produce records of the tenancy in common.

## STATEMENT

While conducting an investigation of Medicaid fraud, a grand jury sitting in the United States District Court for the Eastern District of Michigan issued a subpoena *duces tecum* for certain financial records of "G&S Investments."[1] In response to the subpoena, petitioner appeared before the grand jury, but he asserted the privilege against compulsory self-incrimination and did not produce the subpoenaed documents. Thereafter, following a hearing in district court, petitioner was ordered to reappear before the grand jury and to bring the requested documents.[2] Again petitioner appeared, but again he refused to produce the documents. Petitioner was then adjudged in contempt of court and ordered confined until he produced the records. The court of appeals affirmed the contempt order (Pet. App. 1-10).

According to an affidavit filed by petitioner in district court,[3] petitioner and Hyman Gordon filed a certificate with the county clerk of Oakland County, Michigan, stating that they were transacting business under the assumed name of "G&S Investments." They also opened a

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[1]The following documents were subpoenaed: (1) the G&S Investments cash receipts journal; (2) the G&S Investments cash disbursements journal; (3) bank statements for any and all bank accounts of G&S Investments; (4) cancelled checks relating to those bank accounts; (5) deposit forms for deposits made to those bank accounts; (6) the G&S Investments general ledger; and (7) rental and contractual agreements between G&S Investments and five nursing homes (Pet. App. 2).

[2]The district court ordered petitioner to deliver to the grand jury all subpoenaed documents except the contractual agreements between G&S Investments and the nursing homes.

[3]Petitioner's affidavit (C.A. App. 7-10) is the only account of his relationship to G&S Investments in the record. No testimony was offered by either party at the district court hearing held to determine whether petitioner must comply with the subpoena.



bank account under that name, depositing in it the rental income from real estate in Whitmore Lake, Michigan, in which each owned an undivided 1/3 interest and in which their wives each owned an undivided 1/6 interest. Both petitioner and Gordon are authorized to withdraw from the bank account for the limited purpose of making mortgage and related payments on the Whitmore Lake real estate and to pay income derived from the property to the four tenants in common (Pet. App. 2-3).

## ARGUMENT

Petitioner contends that the privilege against compulsory self-incrimination protects against his compelled production of the financial records of G&S Investments. He contends that the papers of G&S Investments are in fact his personal papers, not the papers of an independent business entity. This Court has rejected similar Fifth Amendment claims where the subpoenaed documents were corporate records (*Wilson* v. *United States*, 221 U.S. 361, 380-386), labor union records (*United States* v. *White*, 322 U.S. 694, 700), and partnership records (*Bellis* v. *United States*, 417 U.S. 85), and the same analysis applies here.

The Court in *Bellis* defined the scope of the privilege as follows (417 U.S. at 87-88):

> The privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life.
>
> * * * * *
>
> On the other hand * * * an individual cannot rely upon the privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if those records might incriminate him personally.

The inapplicability of the privilege to business entities stems from the particularly personal nature of the privilege against compulsory self-incrimination (*id.* at 89-90):

> These decisions reflect the Court's consistent view that the privilege against compulsory self-incrimination should be "limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records." *United States* v. *White, supra,* at 701.

The records of G&S Investments were not petitioner's personal records; they were equally accessible to Gordon and apparently also to both wives. G&S Investments was established as an independent entity specifically to conduct a particular kind of business on behalf of its four principals. Accordingly, whether or not it is technically a partnership under Michigan law, it is nonetheless a "collective entity" established for engaging in a joint business venture, and its records are for that reason outside the protection of the Fifth Amendment privilege. *United States* v. *Hankins,* 565 F. 2d 1344 (C.A. 5) (partnership documents in possession of sole surviving partner are still documents of the "entity" and must be produced over partner's Fifth Amendment objection); *United States* v. *Kuta,* 518 F. 2d 947 (C.A. 7), certiorari denied, 423 U.S. 1014 (documents of two-man partnership must be produced); *United States* v. *Mahady & Mahady,* 512 F. 2d 521 (C.A. 3) (documents of small family partnership must be produced); *Reamer* v. *Beall,* 506 F. 2d 1345 (C.A. 4), certiorari denied, 420 U.S. 955 documents of one-man professional corporation must be produced, even though professional corporation does not possess all attributes of ordinary business corporation).[4]

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[4]Even if the documents in question in this case were deemed petitioner's personal property, they would not necessarily be protected from mandatory disclosure. Subpoenaed documents that are not testimonial in nature must be produced unless the act of producing them would itself be both testimonial and incriminating. *Fisher* v. *United States,* 425 U.S. 391, 408. Many of the documents involved in this case were prepared by the bank or were voluntarily conveyed to the bank. As to such documents, here, as in *Fisher,* the government "is in no way relying on the 'truthtelling' of [petitioner] to prove the existence of or his access to the documents. * * * The existence and location of the papers are a foregone conclusion and [petitioner] adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers" (425 U.S. at 411). Under these circumstances, " 'no constitutional rights are touched. The question is not of testimony but of surrender' " (*ibid.,* quoting *In re Harris,* 221 U.S. 274, 279).



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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